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CONGRESSIONAL TESTIMONY

Miller v. Alabama and Retroactivity

Testimony before
Michigan Senate Judiciary Committee
&
Michigan House Criminal Justice Committee

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Introduction

My name is Charles Stimson, and I am the Manager of the National Security Law Program and Senior Legal Fellow at the Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation or any other organization. By way of background, I am a former local, state, federal and military prosecutor and defense attorney. Currently, I am the Deputy Chief Trial Judge for the Navy-Marine Corps Trial Judiciary, where I am a 21 year veteran and hold the rank of Captain-select. ' I am also the co-author of a book entitled *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, which is attached to my formal written statement.

It is a privilege to be in Michigan, where I worked as an admissions officer for The Culver Academies in the 1980s, and where my family has strong ties. My family traces its roots back to Michigan during the mid-1800s, when they moved to Michigan for a new beginning. My great great great grandfather Horace Stimson was the first postmaster of Lawrence, Michigan. His son, my great great grandfather, T.D. Stimson, moved north and got a job in Muskegon pulling oxen at a lumber camp. Later, he established the first logging operation north of Big Rapids on the Muskegon River. This business was eventually incorporated as the Stimson, Clark Manufacturing Company, located in Big Rapids, and the family expanded into all areas of Western Michigan, from Muskegon, to Big Rapids, to Traverse City. My family was also involved in Michigan's rich maritime tradition, operating steamers on both Lake Huron and Lake Michigan. Although my immediate family left the state around 1890 to pursue other opportunities in the West, we have always been proud of our Michigan heritage.

Life without Parole is Constitutional and Appropriate

Life without parole for juvenile killers is reasonable, constitutional, and (appropriately) rare. In response to the Western world's worst juvenile crime problem, U.S. legislators have enacted commonsense measures to protect their citizens and hold these dangerous criminals accountable. Forty-three states, the District of Columbia, and the federal government have set the maximum punishment for juvenile killers at life without the possibility of parole. By the numbers, support for its use is overwhelming. Nonetheless, its continued viability is at risk from lobbying efforts in many states and court cases that seek to substitute feel-good policies for appropriate and reasonable sentences.

Emboldened by the Supreme Court's *Roper v. Simmons* decision, which relied on the Eighth Amendment's "cruel and unusual punishments" language to prohibit capital sentences for juveniles, anti-incarceration activists have set about extending the result of *Roper* to life without parole for juvenile killers. If they succeed, an important tool of criminal punishment will be eliminated, and all criminal sentences could be subjected to second-guessing by judges, just as they are in capital punishment cases today. The most visible aspects of this campaign are a number of self-published reports and studies featuring photographs of young children and litigation attacking the constitutionality of

life without parole for juvenile offenders—including cases heard by the Supreme Court in its 2009 and 2011 terms.

Because the activists have attempted to monopolize the debate over life without parole, legislatures, courts, the media, and the public have been misled on crucial points. For example, dozens of newspaper articles, television reports, and court briefs have echoed the activists' assertion that 2,225 juvenile offenders are serving life without parole sentences in the United States, despite that this figure is more of a manufactured statistic. The real number is, as we explain in our book, lower than 2,225 but difficult to ascertain because of the way states keep their records. That is why we did the research, and wrote *Adult Time for Adult Crimes*, a comprehensive report setting the record straight. It provides reliable facts and analysis, as well as detailed case studies, with full citations to primary sources.

Activists argue that the Constitution forbids life without parole sentences for juvenile offenders, but the Supreme Court has declined to hold life without parole for juvenile killers unconstitutional in *Graham v. Florida* in 2009 and again in *Miller v. Alabama* in 2011. The Eighth Amendment's prohibition on "cruel and unusual punishments" was intended to bar only the most "inhuman and barbarous" punishments, like torture. Though the Supreme Court has departed from this original meaning, it has honored the principle that courts should defer to lawmakers in setting sentences in almost every instance. One exception applies to punishments that are "grossly disproportionate to the crime," something that the Court has found only in a handful of cases. Otherwise, the Court has approved harsh punishments for a variety of offenses so long as legislatures have a "reasonable basis" for believing that the punishment advances the criminal-justice system's goals. Because no state imposes life without parole for minor crimes, the punishment will never be constitutionally disproportionate. The other exception applies only in death-penalty cases like *Roper*, and the Court has long refused to subject non-death punishments to the deep scrutiny that it uses in capital cases.

Even ignoring that distinction, the argument that *Roper or Graham* could be extended to life without parole sentences comes up short. Indeed, the *Roper and Graham* Court decisions actually relied on the availability of the sentence to justify prohibiting the juvenile death penalty. In fact, the Supreme Court has upheld life without parole sentences for juvenile murderers. In *Graham v. Florida*, despite ruling differently for non-homicide crimes, the Supreme Court found that, under the Constitution, sentencing juveniles who commit murder can be sentenced to life without parole.

Most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system. Every state has a juvenile justice system, and those courts handle the majority of crimes committed by juveniles. But some crimes, including some murders, evince characteristics that push them beyond the leniency otherwise afforded to juveniles: cruelty, wantonness, a complete disregard for the lives of others. Some of these offenders are tried as adults, and a small proportion of them are sentenced to life without parole—the strongest sentence available to express society's disapproval, incapacitate the criminal, and deter the most serious offenses. Used sparingly, as it is, life without parole

is an effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.

Miller v. Alabama: Mandatory Sentencing Schemes and Life without Parole

The latest attack on life without parole came before the Supreme Court in its 2011 term. The Court considered states' use of mandatory sentencing schemes that included life without parole for juvenile homicide offers. The facts of both cases are gruesome, but they demonstrate why life without parole sentences can be appropriate and reasonable. In *Miller v. Alabama*, Evan Miller was 14 years old when he robbed and repeatedly beat an intoxicated neighbor with a baseball bat and then set the man's trailer on fire, leaving him to die. The juvenile court transferred Miller to adult court based on the nature of the crime, his previous delinquency history, and the fact that he was deemed competent to stand trial. Miller was found guilty of capital murder. Since he was 14 at the time of the crime, Miller was not eligible for capital punishment but rather the state's mandatory minimum sentence of life without parole. In *Jackson v. Hobbs*, Kuntrell Jackson was also 14 when he and two other teenagers attempted to rob a video store. Jackson knew one of his accomplices had a sawed-off shotgun and threatened the female store clerk before one of the other teenagers shot her in the face and killed her. Jackson was tried in adult court, where he was found guilty of capital murder and aggravated robbery and sentenced to life without parole.

In its decision, the Supreme Court found that the Eighth Amendment prohibits sentencing schemes that mandate life without the possibility of parole sentences for juvenile murderers, but declined to consider whether it bars juvenile life without parole entirely. Before such a sentence can be imposed on a teenage murderer, the sentencer must consider the offender's youth and other attendant characteristics. The Court stated that its precedents had established that teenage offenders are constitutionally different from adults for sentencing purposes because their "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking, and that these distinctive attributes diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even those who commit the worst crimes. This ruling did not foreclose the possibility of life without parole sentences for juvenile killers, provided the sentencing scheme is not mandatory and allows for an individualized determination. And finally, it is important to note that not a single U.S. Supreme Court Justice was willing to say that life without parole for teenage murderers was unconstitutional.

Miller Does Not Require Retroactive Application

In the wake of the *Miller* decision, some have argued that it applies retroactively in post-conviction appeals. The Supreme Court held in *Teague v. Lane*, 489 U.S. 288 (1989), that rulings creating a new constitutional rule of criminal procedure are generally

not applicable to cases that were final before the new rule was announced. There are two exceptions when a new rule will apply retroactively: if it categorically bars a penalty for a class of offenders or type of crime; or is a watershed of criminal procedure. In addition to these exceptions, an individual challenging his or her conviction based on a new constitutional rule must also demonstrate that the rule is, in fact, "new." A rule is "new" if it "was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

In order to categorically bar a penalty for a class of offenders of type of crime, the rule must be substantive, rather than procedural. While substantive rules change the scope of a criminal statute, procedural rules concern the operation of the criminal trial process. Substantive rules apply retroactively because, as the Supreme Court noted in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), "they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Procedural rules, on the other hand, "merely raise the possibility that someone convicted...with use of the invalidated procedure might have been acquitted...otherwise." In *Bailey v. United States*, 516 U.S. 137 (1995), for example, the Supreme Court announced a substantive rule when it narrowly construed a federal drug trafficking statute, finding that "use" of a firearm during a drug trafficking offense requires "active employment" and not just "mere possession." Thus, conduct that once fell within the scope of the drug trafficking law was no longer criminal following the Court's decision in *Bailey*. A new rule is a watershed rule of criminal procedure if it implicates the fundamental fairness and accuracy of criminal proceedings. The Supreme Court rarely finds a new rule to be a watershed rule, and it generally only extends to the right to counsel in criminal trials.

Thus, *Miller* applies to any cases pending or on direct review at the time of the decision, but it is not retroactive. The Court expressly stated that the ruling "mandates only that a sentence follow a certain *process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller v. Alabama*, 132 S.Ct. 2455, 2471 (2012). The ruling announced in *Miller* is not a substantive rule. Had the Supreme Court found that the Eighth Amendment prohibits the imposition of life without parole sentences for juvenile offenders, that would count as a categorical bar on a type of sentence. Rather, *Miller* held that sentencing schemes that include mandatory life without parole sentences for juveniles violate the Eighth Amendment because it "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change, and runs afoul of [the] requirement of individualized sentencing." 132 S.Ct. at 2460. This decision does not foreclose the possibility that juvenile murderers could be sentenced to life without parole sentences. Rules regulating the manner of determining an offender's sentence or culpability are procedural. The rule announced in *Miller* is plainly a procedural rule and need not be applied retroactively. The U.S. Courts of Appeals for the Fifth Circuit and Eleventh Circuit—the only federal appellate courts to consider this issue—confirmed that *Miller* does not apply retroactively to final convictions. *Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013); *In re Morgan*, 717 F.3d 1365 (11th Cir. 2013).

Before the Fifth and Eleventh Circuit's issued their rulings, the Michigan Court of Appeals agreed that *Miller* is not retroactive and does not apply to direct appeals that became final before the decision in *Miller*. *People v. Carp*, 298 Mich. App. 472 (2012); *see also People v. Eliason*, 300 Mich. App. 293, 309 (2013) ("Here, defendant's case was pending on direct review at the time *Miller* was decided."). A federal district court in Michigan, however, attempted to cast doubt on this proposition when it struck down the state's law prohibiting review by the parole board of those sentenced to life in prison for first-degree murder. *Hill v. Snyder*, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013). Despite the fact that the district court judge was considering a civil action under 42 U.S. § 1983 challenging the constitutionality of a state law, the judge nevertheless weighed in on the retroactivity of *Miller*, and subsequently exceeded his power in finding that "every person convicted of first-degree murder in the State of Michigan as a juvenile and who was sentenced to life without parole shall be eligible for parole." *Hill v. Snyder*, Case No. 10-14568 (E.D. Mich. Aug. 12, 2013). This ruling goes far beyond the issues presented in that case and does not bear on the issue of whether *Miller* applies retroactively.

Miller does not require retroactivity, and there are good reasons for not reopening old cases. The finality of judgments is an important aspect of the criminal law. The deterrent effect of the criminal law suffers when new constitutional rules apply to convictions that were already final. The Supreme Court noted in *Mackey v. United States*, 401 U.S. 667 (1971):

> "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

Finality is essential, not only for the effective operation of a criminal justice system, but also for the victims' families. Radical public policy changes, especially those related to justly convicted juvenile killers, should not be taken lightly. The best policies are based on real facts, and should not be crafted on a campaign of manipulated facts, manufactured statistics, and pro-murderer feel-good stories. I challenge any member of this committee to recite the gruesome facts of just five of the juvenile killers serving life without parole in Michigan jails. Furthermore, pursuant to the proposed bills pending in the House of Representative, by allowing justly convicted juvenile killers already sentenced to life without parole the privilege of a parole hearing after he or she has served fifteen years of their term of imprisonment, and an interview by a member of the parole board every two years until they are paroled, discharged, or deceased, you are sentencing the victims to lifetime of torture, while providing a pathway of freedom for the murderers to rape and kill again.

What is at Stake in Michigan

The opponents of juvenile life without parole will go to great lengths to hide the terrible nature of the crimes committed by those juveniles serving life without parole

sentences. For example, Eric Latimer, of Genesee County, Michigan, was convicted of the first-degree murder of his adopted father and sentenced to life without parole. The ACLU report describes Eric as an emotionally disturbed child with signs of mental retardation who made a detailed confession to the police without his mother present.[1] However, what the ACLU fails to mention, and what the Michigan Court of Appeals states as "undisputed," is that sixteen year old Latimer broke into a safe to steal the guns and knives within, cut the phone lines of the house, waited for his father to return home, and then shot him "repeatedly" at "close range" and slit his throat. After Latimer brutally murdered his father, he took cash and an ATM card off of his father's person, and drove away in his father's van.[2] The court also paints a different picture of Latimer's interrogation. It is correct that his mother was not present during the interrogation, but this was because she was too distraught over the loss of her ex-husband to attend. She did, however, authorize Latimer's uncle to attend the interrogation, and he was present the entire time.[3]

Tia Skinner, a resident of Yale, Michigan, was recently resentenced to life without parole following her mandatory hearing per the *Miller* decision for the premeditated killing of her adopted father, Paul Skinner. At 17, Skinner planned the murder of her parents because they disapproved of her boyfriend and took away her cell phone. On the evening of the attack, Skinner and her parents had gone shopping and out for dinner. Later that evening, Skinner grabbed her confiscated phone and texted her boyfriend that she needed "it done tonight at 11 p.m." That night, Skinner's boyfriend and another teen entered Skinner's home and brutally stabbed her parents. Her parents were stabbed multiple times, her father fatally. Her mother was stabbed 26 times, but survived. During the attack Tia was watching a movie in the basement of the home with her brother. When her brother ran upstairs to help their parents, Tia stayed behind. Police described her demeanor after the attack as "indifferent." Investigators found a map, hand-drawn by Skinner, with the words "my house" written on it and an arrow pointing to her parents' bedroom. Skinner also provided the assailants with a to-do list and knives, left a ladder out, a window open, and promised each of them $500.[4]

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[1] Deborah LaBelle, et. al., ACLU OF MICHIGAN, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS at 14, http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf.

[2] *People v. Latimer*, LC No. 01-007407, No 239700, at 1 (Mich. Ct. App. June 19, 2003)

[3] *Id.* at 3.

[4] Sources: Corey Williams, *Overwhelming Evidence in Yale Murder Case Led Police to Local Suspects,* THE VOICE, Nov. 3, 2010, http://www.voicenews.com/articles/2010/11/30/news/doc4ced2d5eb8ae5919605772.txt?viewmode=fullstory; Anu Prakash, *Judge Sentences Three Teens to Life in Prison Without the Chance of Parole in Yale Murder Case*, WXYZ, Sept. 16, 2011, http://www.wxyz.com/dpp/news/region/st_clair_county/3-teens-to-receive-life-in-prison-; *3 Imprisoned for Life in Yale Stabbings*, CBS DETROIT, Sept. 16, 2011, http://detroit.cbslocal.com/2011/09/16/3-imprisoned-for-life-in-yale-stabbings/; Ed White, *Mich. Woman Sentenced to Life Again in Dad's Death*, ABC NEWS, Jul. 11, 2013, http://abcnews.go.com/m/story?id=19637187&sid=81 ; *Teen Convicted of Deadly Knife Attack n Parents Blames 'Bad Temper'*, CBS DETROIT, Jul. 12, 2012, http://detroit.cbslocal.com/2012/07/12/teen-convicted-of-deadly-knife-attack-on-parents-blames-bad-temper/; Elisha Anderson, *3 Ordered Held for Trial in Yale Stabbings*, DETROIT FREE PRESS, Nov. 23, 2010, http://www.freep.com/article/20101123/NEWS06/101123022/3-ordered-held-trial-Yale-stabbings.

A more recent example is the conviction of Dontez Tillman and Thomas McCloud of the 2008 killing of Wilford Hamilton in Pontiac, Michigan. These fourteen year old boys beat Hamilton, a homeless man, to death for refusing to give the pair a cigarette. Hamilton's body was found in an alley outside of a nightclub and was "beaten and disfigured to the point of being unrecognizable." McCloud was convicted of an additional count of first degree murder for the beating of another man, Lee Hoffman. Hoffman was beaten and left in a park. He died a month later from head injuries sustained in the attack. Because of the *Miller* decision, these killers are waiting re-sentencing. If these men, willing to brutally beat a homeless person to death over a cigarette, were to be sentenced to life with the possibility of parole, there is a chance they could someday be walking the streets of Oakland County.[5]

Conclusion

Before enacting this policy change, it would be prudent for this body to review all the real and unvarnished facts and grizzly details of each murder that lead to a life without parole sentence. Thank you for the privilege of testifying before the Committee, and I look forward to your questions.

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[5] Source: Dave Phillips, *Two Men Convicted as Teenagers in Beating Death of Pontiac Homeless Man Need New Sentences, Appeals Court Rules*, OAKLAND PRESS, May 31, 2013, http://www.theoaklandpress.com/articles/2013/05/31/news/doc51a8c960f1bb4645680563.txt?viewmode=fullstory.

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